

**DISTRICT OF COLUMBIA**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
825 North Capitol Street, NE, Suite 4150  
Washington, DC 20002-4210

DISTRICT OF COLUMBIA  
DEPARTMENT OF HEALTH  
Petitioner,

v.

DEWITT FORTENBERRY, D.D.S.  
Respondent

Case No.: DH-B-05-800021

**FINAL ORDER**

**I. Introduction**

Respondent Dewitt Fortenberry, D.D.S, who holds a license to practice dentistry in the District of Columbia, has requested a hearing on a Notice of Intent to Take Disciplinary Action (“Notice”) issued to him by the Board of Dentistry (the “Board”).<sup>1</sup> The Board has delegated its authority to conduct a hearing to this administrative court.<sup>2</sup>

The Notice is based on disciplinary action taken by the Maryland Board of Dental Examiners. (“Maryland Board”) There are three charges in the Notice, with multiple “specifications” for each charge. With respect to each of the charges, the Notice alleges that Respondent was disciplined by the Maryland Board for conduct that would be grounds for disciplinary action in the District of Columbia, making Respondent subject to reciprocal

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<sup>1</sup> This case arises under the District of Columbia Health Occupations Revisions Act of 1985, as amended, (D.C. Official Code §§ 3-1201.01 *et seq.*) (the “Act”), and Title 17, Chapter 41 of the District of Columbia Municipal Regulations (“DCMR”).

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D.C. Official Code § 2-1801.03(c) and 17 DCMR 4114.

disciplinary action in the District of Columbia pursuant to D.C. Official Code 3-1205.14(a)(3).

The conduct alleged as the basis for disciplinary action in each of the charges is as follow:

Charge I - Violating conditions of probation imposed pursuant to a November 2004 Consent Order entered into with the Maryland Board, which would be grounds for disciplinary action under D.C. Official Code § 3-1205.14(a)(27);

Charge II - Maintaining an unsanitary office or performing professional services under unsanitary conditions, which would be grounds for disciplinary action under D.C. Official Code § 3-1205.14(a)(22);

Charge III - Failing to conform to standards of prevailing practice which would be grounds for disciplinary action under D.C. Official Code § 3-1205.14(a)(26).<sup>3</sup>

An evidentiary hearing was held on January 9, 2007.<sup>4</sup> At the hearing, Maureen W. Zaniel, Esq. represented the Government, and Gabrielle Schultz, a Health Licensing Specialist for the Board, testified for the Government. Respondent was represented by Othello Jones, Esq. and testified on his own behalf.

Pursuant to 17 DCMR 4115, the Government has the burden of proving by a preponderance of the evidence that the proposed disciplinary action should be taken. *See Sherman v. Commission on Licensure to Practice the Healing Art* 407 A.2d 595, 600-601 (D.C. 1979) (holding that Due Process does not require use of a higher standard of proof than preponderance of the evidence in disciplinary proceedings against health professionals).

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<sup>3</sup> The Government moved to dismiss a fourth Charge at the opening of the hearing and that motion was granted.

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The hearing was scheduled after the Government filed its second amended Notice on November 22, 2006. The Government amended the original Notice twice: first to correct a defect and then to amend the Notice in light of action taken by the Maryland Board after the original Notice was filed.

For the reasons which follow, I have concluded that the Government has met that burden and established that Respondent may be disciplined in the District of Columbia based on the disciplinary action taken by the Maryland Board.

## **II. Findings of Fact**

The following findings of fact are based upon the testimony of the witnesses, my evaluation of their credibility, the admitted documentary evidence and the entire record in this matter.

Respondent entered dental school in 1971, after working in other fields following his graduation from college in 1958. He has practiced dentistry for over thirty years, since his graduation from dental school in 1975. Until 1990, he had an office in the District of Columbia where he saw patients. In 1990, he moved his office to Maryland, where he practiced until he surrendered his license in August, 2006. Although Respondent holds a District of Columbia dental license, he does not currently see patients in the District of Columbia and has not practiced dentistry in the District since he moved his office to Maryland in 1990. During the thirty years he has held a District of Columbia license to practice dentistry, Respondent has not been involved in any prior disciplinary actions in the District of Columbia.

### **A. Consent Order of November 15, 2004**

Respondent entered into a Consent Order on November 15, 2004 (“2004 Consent Order”) with the Maryland Board to resolve charges that had been brought by the Maryland Board on August 4, 2004. Government’s Exhibit “GX” 100. These charges included allegations that Respondent violated the terms of a two year probation imposed by a previous Consent Order that

Respondent entered into with the Maryland Board on December 18, 2002. (“2002 Consent Order”)

Respondent entered into the 2002 Consent Order to resolve charges resulting from an inspection conducted in January 2002 to investigate a complaint about Respondent’s infection control practices. The investigator for the Maryland Board who conducted the inspection found numerous violations of Centers of Disease Control (“CDC”) Guidelines to prevent the transmission of disease in dental practices. The violations observed included failure to purge waterlines between patients, failure to disinfect surfaces, and failure to spore test an autoclave, a device used to sterilize equipment.<sup>5</sup> Respondent failed to acknowledge an offer by the Maryland Board in March 2002 to resolve the violations with a Pre-Charge Consent Order, and the Maryland Board issued charges on October 2, 2002. The 2002 Consent Order that Respondent entered into to resolve those charges provided for a 30 day suspension, training in the CDC Guidelines, and a two-year probation, during which Respondent was subject to unannounced inspections to determine compliance with the CDC Guidelines.

After Respondent entered into the 2002 Consent Order, the Maryland Board’s investigator conducted inspections of his office in January, April and July of 2003. While the investigator observed compliance with CDC guidelines during the January 2003 inspection, she reported to the Maryland Board that she observed numerous violations of CDC Guidelines during the April and July 2003 inspections, including failure to autoclave handpieces between patient use and answering the phone with contaminated gloves and returning to the patient’s mouth without changing gloves or washing his hands.

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An autoclave is a device that heats the instruments to kill bacteria and other infectious agents and spore testing is a way to determine whether it is working effectively to kill microorganisms.

After the July 2003 inspection, the Maryland Board wrote to Respondent in September 2003 directing him to respond to each of the violations noted by the investigator within ten days, to cease using non-autoclavable handpieces, and to provide spore test results to the Board. Respondent did not respond to that letter or to a subsequent letter the Board sent to Respondent in February 2004, which directed him to provide the investigator with evidence of attendance at annual inspection control training and spore test records, despite numerous reminder calls from the investigator. He also failed to respond to numerous attempts the investigator made to reach him during April and May of 2004 to arrange another inspection. As a result, in August 2004, the Maryland Board again issued charges against Respondent.

To resolve these charges, Respondent entered into the 2004 Consent Order. The 2004 Consent Order imposed a six-month suspension, but provided that Respondent could seek reinstatement if he could demonstrate he had undergone required training and evaluation on the CDC Guidelines.

After Respondent demonstrated that he met these conditions, his license was reinstated on May 18, 2005. The 2004 Consent Order provided that upon reinstatement, Respondent would be placed on probation for three years subject to conditions that included unannounced random inspections to monitor compliance with CDC guidelines and training with a consultant approved by the Maryland Board who would provide written recommendations to Respondent and report to the Board following each training session and/or inspection. It also provided that Respondent would spore test his autoclave on a weekly basis and send the spore test results to the Board's case manager on a monthly basis.

In addition, the Consent Order provided that if an inspection of Respondent's office shows that he was not in compliance with CDC guidelines or failed to provide with the spore test

results to the case manager, the Board could take disciplinary action including immediate suspension of his dental license, provided that Respondent was given the opportunity for a show cause hearing.

When Respondent entered the 2004 Consent Order, he explicitly waived his right to contest any of its terms and findings and acknowledged that it was as enforceable as if it had been made after a formal evidentiary hearing. He had the assistance of counsel when he entered into the 2004 Consent Order.

**B. Order of Suspension of February 15, 2006**

On or about January 4, 2006, the Maryland Board's consultant met with Respondent and conducted a pre-arranged or announced CDC inspection of Respondent's office pursuant to the 2004 Consent Order. She reviewed Respondent's spore test results during that visit and found that Respondent had failed to spore test his autoclave on a weekly basis since reinstatement. She also found that two of the nine spore tests that were performed were failures, indicating that the autoclave was not killing bacterial spores. Following that visit, the Board issued an Order of Suspension on February 15, 2006. GX 102. After reviewing the historical background of the investigations of Respondent's practices dating back to the January 2002 inspection, the Order of Surrender set out "Investigative Findings of Facts" which in part stated as follows:

15. The Respondent has not since the date his license was reinstated, provided copies of his spore test results to the Board's case manager.

16....Since the date of reinstatement, the Respondent has failed to spore test his autoclave on a weekly basis ..... [and two of the nine tests conducted] were failures indicating that the autoclave was not killing bacterial spores.

17. The autoclave purchased by Respondent was purchased in the 1960s and its temperature gauges and timing devices were not functioning. The Respondent therefore had no ability to know how long he was sterilizing the instruments or if the temperature reached adequate levels.

Based on these findings, the Maryland Board found that Respondent failed to comply with the terms and condition of his probation and the 2004 Consent Order and suspended his license to practice dentistry in the State of Maryland. The Suspension Order explicitly advised Respondent that he had a right to an evidentiary hearing on the Suspension Order.

**C. Letter of Surrender dated August 24, 2006**

Respondent did not exercise his right to a hearing, but instead surrendered his Maryland license to practice dentistry. In his Letter of Surrender dated August 24, 2006, GX 103. He stated as follows:

My decision to surrender my license to practice dentistry in Maryland has been prompted by continuing investigations of my licensure by the Board and the Office of the Attorney General....My license was summarily suspended on February 15, 2006 and has been suspended since that date. The suspension resulted from on-going violations of Centers for Disease Control ("CDC") Guidelines and violations of previous Board Orders because of my violations of CDC Guidelines....

I acknowledge that the Office of the Attorney General would prove by a preponderance of the evidence at an administrative hearing that I continued to violate CDC Guidelines and failed to comply with a Board Order and failed to comply with a Board Order...

By virtue of this Letter of Surrender, I waive any right to contest the charges and findings contained in the charges. .. I understand that by executing this Letter of Surrender I am waiving any right to contest these findings...

Respondent then agreed to surrender his license and not to seek reinstatement of his license for two years. He further agreed that if he elected to seek reinstatement, he would bear the burden of demonstrating competency to the Maryland Board and complying with other conditions that may be established by the Board for reinstatement. Respondent had the assistance of counsel when he executed the Letter of Surrender.

### III. Conclusions of Law

Under the D.C. Health Occupations Revision Act of 1985, as amended, an individual who has been disciplined in another jurisdiction or by another licensing authority may be subject to reciprocal discipline in the District of Columbia “if the conduct would be grounds for discipline here.” *Faulkenstein v. D.C. Board of Medicine*, 727 A.2d 302, 307 (D.C. 1999). In addition, it must be shown that the individual was afforded due process in the prior disciplinary proceeding, including adequate notice and a meaningful opportunity to be heard. *See In re Bridges*, 805 A.2d 233 (D.C. 2002) (recognizing procedural due process exception to imposition of reciprocal discipline for attorneys in the District); *In Re Karen S. Day*, 717 A2d 883, 886 (D.C. 1998)

Thus, with respect to the reciprocal discipline charges set forth in the Notice, the Government must satisfy two requirements: (1) another authority took disciplinary action against Respondent, where the Respondent had sufficient notice and an opportunity to be heard, and (2) that the grounds for that disciplinary action would also be grounds for disciplinary action in the District. D.C. Official Code § 3-1205.14(a)(3). *In re Joan G. Bartlett*, Ph.D Case OAH No. B-02-80113 (Recommended Decision, March 19, 2004) *In re Berner*, OAH No. B-02-80107 at 20-24 (Prehearing Order, October 23, 2002).<sup>6</sup>

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<sup>6</sup> These orders will soon be available on the LEXIS system in the “District of Columbia Office of Administrative Decisions.”



A. Due Process afforded by the Maryland Board

In the specifications of charges in the Notice filed in this case, there are two instances of disciplinary action taken by the Maryland Board that are relied on by the Government as a basis for disciplinary action in the District of Columbia. The first instance is the action taken as a result of the Letter of Surrender dated August 24, 2006, which resolved the charges made in the Order for Suspension dated February 15, 2006. The second instance is the disciplinary action taken as a result of the 2004 Consent Order that Respondent entered into to resolve charges brought by the Maryland Board on August 4, 2004.

In both instances, Respondent was clearly afforded notice and an opportunity to be heard before disciplinary action was imposed. The Order of Suspension clearly advised Respondent that he had a right to an evidentiary hearing. Respondent elected not to exercise his right to a hearing, but instead, acting with the advice of counsel, signed the Letter of Surrender in which he explicitly stated that he was waiving “any right to contest the charges and findings contained in the charges.” Respondent, again acting with the assistance of counsel, also explicitly waived his right to contest any of the terms, findings of fact, or conclusions of law contained in the 2004 Consent Order

It is well established that an individual can waive any process to which he or she has a right. *In Re Karen S. Day*, 717 A2d 883, 886 (D.C. 1998) and cases cited therein. For the purpose of reciprocal discipline, if an individual has validly waived an evidentiary hearing in another jurisdiction with respect to specified charges, he is deemed to have waived any right to an evidentiary hearing that he might have with respect to the same charges in this jurisdiction. *In*

*Re Richardson*, 692 A.2d 427 (D.C. 1997) *cert. denied* 118 S.Ct. 1056 (1998). Since Respondent was afforded a right to a hearing and waived that right, he was clearly afforded the requisite due process before disciplinary action was imposed.

#### B. Grounds for Disciplinary Action

Having determined that Respondent was afforded due process before disciplinary action was taken against Respondent by the Maryland Board, we will turn to examining whether the conduct on which that disciplinary action was based would also be grounds for disciplinary action here. The Government has alleged three grounds for imposing reciprocal discipline. We will focus on the central issue, which is also of greatest concern for public health, maintaining an unsanitary office or performing professional services under unsanitary conditions, which are grounds for disciplinary action under D.C. Official Code § 3-1205.14(a)(22).

The record in this case is replete with uncontroverted evidence that the disciplinary action of license suspension was imposed by the Maryland Board because Respondent performed professional services under unsanitary conditions. For example, in the Letter of Surrender, Respondent admitted that the “suspension resulted from on-going violations of Centers for Disease Control (“CDC”) Guidelines and violations of previous Board Orders because of my violations of CDC Guidelines.” In addition, Respondent acknowledged “that the Office of the Attorney General would prove by a preponderance of the evidence at an administrative hearing that I continued to violate CDC Guidelines and failed to comply with a Board Order.”

The CDC Guidelines are nationally recognized standards for preventing and controlling the transmission of diseases to dental patients and staff. They are important health and safety measures designed to minimize the possibility of harm that can result from exposure to blood,

saliva, and other bodily fluids during dental procedures. Respondent has admitted continuing violations of CDC Guidelines in the Order of Surrender. In addition, the findings of fact which Respondent explicitly admitted when he entered into the 2004 Consent Order, show a pattern of continuing serious violations of those Guidelines, despite efforts by the Maryland Board over an extended period of time to provide Respondent with training and monitor compliance. Respondent should have complied with those procedures on his own without the intervention of any regulatory agency. While there were some inspections that showed improvements, there were then major relapses, and a failure to respond to directives from the Maryland Board to provide information to enable it to monitor Respondent's compliance. These serious repeated violations of the CDC Guidelines would clearly constitute grounds for disciplinary action under D.C. Official Code §3-1205.14(a)(22) for maintaining an unsanitary office or performing professional services under unsanitary conditions. They are thus a basis for imposing discipline on a reciprocal basis pursuant to D.C. Official Code § 3-1205.14(a)(22).

Since one of the charges brought by the Government has been clearly established, it is not necessary that the Government's two remaining charges be addressed. *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206, 216 (1908) (Justice Holmes noting, "We decide only what is necessary.").

### C. Respondent's Contentions

At the hearing, Respondent's principal contentions were that Respondent's license was suspended in Maryland primarily because he failed to spore test his autoclave weekly, and since weekly testing of an autoclave is not required in the District of Columbia, this conduct cannot be a basis for imposing reciprocal discipline in the District of Columbia. This argument fails for several reasons. First, in the Letter of Surrender, Respondent admitted that the "suspension

resulted from on-going violations of Centers for Disease Control (“CDC”) Guidelines.” In addition, Respondent admitted all of the fact findings set out in the 2004 Consent Order, which contain a litany of violations of sanitary practices and the CDC Guidelines. These admissions alone show that the basis of suspension was much broader than the failure to spore test the autoclave.

Secondly, the Maryland Board required Respondent to provide weekly spore test results in an effort to monitor his activities in light of his failure to adhere to accepted sanitary practices in the dental profession. This is not a requirement imposed on dentists in Maryland that is not imposed on dentists in the District of Columbia. Rather, it was a monitoring tool imposed on Respondent, and not generally imposed on Maryland dentists, because the investigator observed unsanitary practices in his office. It is these unsanitary practices, which are also a basis for license suspension in the District of Columbia, which were the underlying basis for the Board’s charges.

Respondent also argued that there was evidence that the Maryland Board failed to take into account before it took disciplinary action. This evidence related to the reasons that Respondent failed to spore test his autoclave on a weekly basis, repairs performed on Respondent’s autoclave, and some generally favorable inspection reports in 2005.<sup>7</sup> While this is

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<sup>7</sup> Respondent testified that the reason he had not spore tested his autoclave on a weekly basis was that he was working a limited schedule and there were a number of weeks that he was not in the office. In addition, in the weeks that he was in the office, he typically worked only eight to ten hours a week and there was sometimes not enough equipment to autoclave. However, Respondent admitted that he had sought no revision of the condition of probation imposed by the Maryland Board that required weekly spore testing.

In addition, Respondent submitted into evidence an invoice for \$851 from Columbia Dental of Laurel, Maryland dated January 8, 2006 for repairs on Respondent’s autoclave. This work was performed four days after a January 4, 2006 inspection by the consultant during which she found that the temperature gauges and timing devices on the autoclave were not functioning, which prevented Respondent from knowing if he was effectively sterilizing dental implements. The

evidence that Respondent might have offered in a Maryland proceeding, he elected to waive his right to an evidentiary hearing and explicitly admitted that the Maryland Attorney General could prove that he violated the CDC Guidelines by a preponderance of the evidence.<sup>8</sup>

However, Respondent's evidence contesting the basis for the determinations made in Maryland can not be considered in this proceeding. Reciprocal discipline involving health occupations may be imposed in the District of Columbia so long as the Government establishes that other authority provided sufficient notice and opportunity to be heard before imposing disciplinary action and the grounds for that disciplinary action would also be grounds for disciplinary action here. While Respondent may present evidence to show that these requirements have not been satisfied, any other evidence is irrelevant and Respondent may not re-litigate the charges. *In re Todd P. Berner M.D.* OAH No. B-02-80107 at 20-24 (Prehearing Order, October 23, 2002).

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Government tested the authenticity of the document. In addition, Respondent testified that his autoclave was not purchased in the 1960's, as indicated in the Order of Suspension, since he purchased it after he started to practice dentistry in 1975.

Respondent also entered into evidence reports on inspections of Respondent's office conducted by the Maryland Board's consultant on May 12, July 9, and July 15, 2005 which generally report that the majority of the infection control problems in the office report have been resolved and that only minor problems were observed. RX 201, 202, 203.

In light of the determination that this evidence is not relevant in a reciprocal discipline case, I am not making any findings with respect to this evidence.

<sup>8</sup> Even without the admissions of wrongdoing contained in Respondent's Letter of Surrender, Respondent's surrender of his license in the face of pending disciplinary action could constitute discipline on which reciprocal disciplinary action could be imposed in the District of Columbia. *In Re Karen S. Day*, 717 A2d 883, 886 (D.C. 1998) (voluntary surrender of license to practice law without admission of wrongdoing while disciplinary proceeding pending).

#### D. Terms of Suspension

The Government has requested that Respondent's license be suspended on the same terms as the suspension in Maryland. By the terms of the Letter of Surrender, Respondent's license was suspended and he was not permitted to seek reinstatement before August 24, 2008, which is two years from the date of the Letter of Surrender. He also agreed that if he seeks reinstatement, he bears the burden of demonstrating to the Maryland Board that he is competent and that the Board may set terms and conditions that will apply to receiving a reinstated license or a new license. Based on the evidence presented in this proceeding, imposition of similar terms by the District of Columbia Board appears appropriate.

#### IV. Order

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is this 12<sup>th</sup> day of March 2007:

**ORDERED**, that Respondent's license to practice dentistry in the District of Columbia is hereby **SUSPENDED** and that he may not seek reinstatement of his license until at least August 24, 2008, and it is further

**ORDERED**, that if Respondent applies for reinstatement of his District of Columbia license or issuance of a new license, the Board may set terms and conditions that will apply the new or reinstated license, that Respondent will approach the Board in the same posture as one whose license has been revoked, and will bear the burden of demonstrating that he is competent and will practice in accordance with CDC Guidelines; and it is further

**ORDERED**, that the appeals rights of any person aggrieved are listed below.

March 12, 2007

\_\_\_\_\_/s/\_\_\_\_\_  
Mary Masulla  
Administrative Law Judge